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Misdemeanor Manslaughter Under State Statutes

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the statute, as a whole, must be stated in positive language to assure a standard interpretation by the courts.

The following model statute is submitted as effecting the ideas found in the above paragraph:

“Manslaughter:

I. Voluntary —

II. Involuntary — Involuntary manslaughter is the unintentional, unlawful killing of a human being. It is of two kinds:

- (1) In the perpetration, or attempt to perpetrate, any common law or statutory misdemeanor which endangers human life and safety. The homicide must be the proximate result of the commission of, or attempt to commit, the misdemeanor.
- (2) In the commission of any lawful act in a criminally negligent manner.”

It will be noted that the ultimate test for conviction under subsection (1) and subsection (2) is the same, although stated in a different manner. Liability is based upon the amount of danger in the act under sub-section (1), while negligence is the basis of liability in sub-section (2). Negligence, however, is determined by the foreseeability of danger. Thus a conviction of involuntary manslaughter may only be obtained by showing a dangerous act. Any conviction that could be obtained under sub-section (1) could also be obtained under sub-section (2). It follows that it might be well to eliminate the misdemeanor manslaughter and to base the conviction of involuntary manslaughter solely upon negligence.

ROBERT F STEPHENS

MISDEMEANOR MANSLAUGHTER UNDER STATE STATUTES*

Today, in the absence of statute, it is involuntary manslaughter where one unintentionally kills another in the commission of an unlawful act not amounting to a felony.¹ This is usually referred to as the misdemeanor manslaughter doctrine. Under this rule the killing is done without any design, intention or purpose of killing, but in the commission of some unlawful nonfelonious act.

This rule is the basis for the “misdemeanor manslaughter” statutes which have been adopted by twenty-five states. Before examining these statutes, it is essential that the common law be closely observed. The mental state which characterizes the crime of involuntary manslaughter is the absence of intention to cause death. In determining whether a culpable homicide was committed by a person while engaged in the commission of a misdemeanor, it is not necessary to conclude that he shall have *intended* to violate the law, although he must have had an intent to commit the *act*. The unlawful act, however, must be dangerous in itself or in marked disregard of the safety of others. A mere thoughtless omission or slight deviation from the norm of reasonable conduct will not suffice. The state of mind of the person while committing the act is not controlling. Fur-

* This is a companion note to the one by Mr. Stephens on page

¹ Wilner, *Unintentional Homicide in the Commission of an Unlawful Act*, 87 PA. L. REV. 811 (1939).

² See, *Westrup v. Commonwealth*, 123 Ky. 95, 93 S.W. 646 (1906).

thermore, it is of no importance whether the act was unlawful in its inception or became unlawful after the act was begun. The infraction must be such as would be reasonably anticipated by an ordinary prudent man as likely to result in the homicide. There must be such legal relation between the commission of the unlawful act and the killing that it logically follows that the homicide occurred as a part of the perpetration of, or attempt to commit, the unlawful act. The death must result from the unlawful act of the accused and not from the intervening act or negligence of a third person, or to an independent intervening cause in which the accused did not participate and which he could not foresee. Thus, the death must have been the natural and probable consequence of the unlawful act, and the act the proximate cause of death.³

Twenty-two states have no statutory provision for misdemeanor manslaughter. In Texas there is no such crime as "involuntary manslaughter," but the existing statute has substituted what is termed "negligent homicide."⁴ Since all of the aforementioned twenty-two states have manslaughter statutes they must of necessity rely upon the common law in those cases where the accused kills a person while in the perpetration of a misdemeanor. The remaining twenty-five states have adopted statutes which either closely resemble the common law or have revised it to some extent. In examining these statutes, it must be remembered that they were created to furnish the courts with an accurate guide, either by making the common law more definite or by improving upon it by making certain revisions or additions. It is wise to keep in mind the fact that almost half of the states have thought it unnecessary to codify the common law. This fact alone indicates that the legislative task of creating a misdemeanor manslaughter statute of any real value over the common law is a difficult one.

Six states⁵ have statutes which are readily distinguishable from the others in that they they require the killing to occur while the accused is committing some "unlawful act" The Tennessee Statute is a good example. It states:

"Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act."

Such a statute resembles the common law except for the expansion of that rule, insofar as the collateral act is concerned, from a mere misdemeanor to *any* unlawful act. Therefore a person who kills while committing a felony could be found guilty of manslaughter, thus encroaching upon the felony murder doctrine, unless there were a parallel felony murder statute. The wording of the statute brings the court face to face with the problem of determining whether the legislature intended to *expand* the common law or whether it merely intended to *codify*

³ Note, 63 L. R. A. 379; 40 C. J. S. 918-921.

⁴ Texas has no such crime as involuntary manslaughter but the statute [Tex. Stat. Pen. Code, art. 1230 et seq. (Vernon, 1936)] has substituted what is termed "negligent homicide," which consists in the doing of an act, lawful or unlawful, in a careless or negligent manner, when there is apparent danger of causing the death of the person killed or some other, but with no apparent intention to kill. The homicide must be the consequence of the act done or attempted to be done.

⁵ 4 ARK. STAT. ANN. sec. 41-2209 (1947); 4 IND. STAT. ANN. sec. 10-3405 (Burns, 1942); 2 NEB. REV. STAT. sec. 28-403 (1943); 3 ORE. COMP. LAWS ANN. sec. 23-406 (1940); 7 TENN. CODE ANN. sec. 10774 (Williams, 1934); 1 WYO. COMP. STAT. ANN. sec. 9-205 (1945). Note that all except the Oregon Statute require the killing to be done either "without malice" or without "intent."

it and did so rather inefficiently. It is difficult to see how such a piece of legislation can achieve its purpose of putting at the court's disposal a more effective instrument than that afforded by the common law. In this case, the instrument needs sharpening before it will be of value to the court in helping to untangle the many problems created by human inability to conform to the desired standards of behavior. With such an instrument to rely upon, the court may scratch the surface but fail to pierce the heart of the legal problem. Since such high stakes as a man's freedom may hinge upon a correct interpretation of a few ill-chosen words, ambiguity should be reduced to a minimum.

Colorado, Georgia, Illinois, and Nevada have statutes⁶ similar to the above group, but have additional provisions. The Georgia statute is typical of the group under consideration. It states:

"Involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence, in an unlawful manner; Provided that where such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder."

This statute excludes felonies from the unlawful acts which will satisfy the requirements for manslaughter, but does not reduce the necessary collateral acts to misdemeanors only. The provision that makes it manslaughter to kill while committing a lawful act in an unlawful manner is an adaptation of the common law. The resulting statute on its face apparently combines the misdemeanor manslaughter rule and the negligent manslaughter doctrine. The distinction, if any, between the commission of an unlawful act and a lawful one in an unlawful manner is indeed vague. It is doubtful whether there are any situations which would fall within the "unlawful commission of a lawful act" sphere which would not be within either the misdemeanor manslaughter or the negligent manslaughter provisions. Thus, the lawful act clause in the statutes under consideration is surplusage and does not improve upon the unlawful act provision in those states which have a negligent manslaughter provision in their statutes.

The Louisiana and the Idaho Statutes⁷ are the only other ones which include both misdemeanors and felonies, although the latter are specifically limited. The Louisiana Statute states:

"Manslaughter is: (2) A homicide committed, without any intent to cause death or great bodily harm (a) when the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30, or any intentional misdemeanor directly affecting the person "

It will be noted that this statute, unlike the preceding one, includes only misdemeanors directly affecting the person. The Idaho Statute is the same as that of

⁶ 2 COLO. STAT. ANN. c. 48, sec. 36 (1935); 6 GA. CODE ANN. sec. 67 (Park, 1914); ILL. REV. STAT. c. 38, sec. 363 (1947); 5 NEV. COMP. LAWS ANN. sec. 10072 (Hillyer, 1929).

⁷ 4 IDAHO CODE sec. 18-4006 (1948); LA. CODE CRIM. LAW AND PRO. ANN. art. 740-31 (Dart, 1943).

Louisiana except that the excluded felonies are specifically set out in the statute. It states:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

- (1) Voluntary
- (2) Involuntary, in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, burglary, or mayhem; or "

Six states⁶ have similar statutes of which the Arizona Statute is typical. It states:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: voluntary involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in any unlawful manner, or without due caution and circumspection."

This statute limits the collateral act to a misdemeanor, but as stated would include any misdemeanor, whether dangerous to life or not. Such an all-inclusive provision will undoubtedly produce harsh results and should distinguish between misdemeanors which directly endanger life and those that do not.

Seven states⁷ have statutes which separate manslaughter into degrees, it being first degree manslaughter to kill unintentionally while committing a misdemeanor. The Wisconsin Statute is typical of this group. It states:

"The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony, or in an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree."

In substance this statute is substantially a replica of the common law. However, since first degree manslaughter is comparable to voluntary manslaughter in regard to the relative penalties involved, this statute deviates from the common law which puts misdemeanor manslaughter in the category of involuntary manslaughter, with a lighter penalty than for voluntary manslaughter. Minnesota and New York have statutes which distinguish between misdemeanors affecting persons or prop-

⁶ 3 ARIZ. CODE ANN. sec. 43-2904 (1939); CAL. PEN. CODE sec. 192 (Deering, 1949); 2 MISS. CODE ANN. sec. 2221 (1942); 8 MONT. REV. CODE ANN. sec. 94-2507 (1947); 3 N. M. STAT. ANN. sec. 41-2407 (1941); 5 UTAH CODE ANN. sec. 103-28-5 (1943).

⁷ KANS. GEN. STAT. ANN. sec. 21-407 (1935); 2 MINN. STAT. SECS. 619.15, 619.18 (1945); 1 N. D. REV. CODE sec. 12-2717 (1943); N. Y. PEN. CODE sec. 1050, 1052 (Thompson, 1939); OKLA. STAT. ANN. tit. 21, sec. 711 (1941); 1 S. D. CODE sec. 13.2013 (1939); WIS. STAT. sec. 340.10 (1949). Note that the Kansas Statute is worded the same as the Wisconsin Statute cited. The North Dakota and Oklahoma Statutes state: "Homicide is manslaughter in the first degree in the following cases: (1) when perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor. (2) The South Dakota Statute states that "Homicide is manslaughter in the first degree in following cases: (1) When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor involving moral turpitude; (2)

erty and those which do not, a killing arising from the commission of a misdemeanor in the latter group being second degree manslaughter. The New York statute states:

"Such homicide is manslaughter in the first degree, when committed without a design to effect death: (1) By a person engaged in committing, or attempting to commit, a misdemeanor, effecting the person or property, either of the person killed or of another; or "

"Such homicide is manslaughter in the second degree, where committed without a design to effect death: (1) By a person committing or attempting to commit a trespass or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; "

This statute is broad and therein lies its weakness. The provision for manslaughter in the first degree includes not only those acts affecting life but also property. This section therefore does not include all misdemeanors, but it does extend liability beyond the category of acts dangerous to life. The section on second degree manslaughter will undoubtedly result in many harsh decisions. It is questionable whether the usefulness of a provision which includes acts that are not crimes but merely torts will outweigh the many injustices it will perpetrate. It would appear to be adverse to a wise public policy.

A summation of the statutes reveals that few additions or alterations have been made in the common law. The changes which have been made show no marked departure from the common law. Since almost half of the states rely solely upon the common law and numerous others have kept it intact in their statutory provisions, there is little doubt that it has proven adequate in most cases. The statutes which deviate from the common law have failed to improve upon it in any marked degree. A provision which includes any misdemeanor or one which includes infractions which are not crimes certainly does not improve the common law.

Using as guides the existing statutes which have in most part failed in their attempt to either codify or revise the common law, it seems that in preparing a model statute one should focus his efforts toward a satisfactory *codification* of the common law rather than experiment with *modifications*. A good codification of the common law is certainly of greater value to the court than no codification at all, since a satisfactory statement of the common law, as it is actually interpreted, is not found in the cases. The present statutes illustrate how difficult it is to codify the common law and eliminate ambiguity and vagueness. It is suggested that the reader bear this in mind in evaluating the following statute which is offered as a solution to the problem discussed throughout the note.¹⁰

"Involuntary manslaughter is a homicide committed without intent to cause death or great bodily harm when the offender (1) is engaged in the perpetration of any misdemeanor which is inherently dangerous to life and which is the proximate cause of such homicide."

(2) [Provision for negligent manslaughter].

CHARLES R. GROMLEY

¹⁰ Perhaps, it should be pointed out that this statute is the equivalent of the modern statement of the common law rule in the case of involuntary manslaughter based upon negligence but this raises problems which are beyond the scope of this paper. It is worth noting, however, that the lawfulness or unlawfulness of the act is not the criterion of liability—it is its inherent danger.